**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| TIMOTHY HASELDEN, | ) | |
| Employee | ) | OEA Matter No. 1601-0001-06-C-09 |
| | ) | |
| v. | ) | Date of Issuance: November 25, 2008 |
| | ) | |
| D.C. METROPOLITAN POLICE DEPARTMENT, | ) | |
| Agency | ) | ERIC T. ROBINSON, Esq. |
| | ) | Administrative Judge |
| | ) | |

James Pressler, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

## ADDENDUM DECISION ON COMPLIANCE[1]

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 6, 2005, Lieutenant Timothy Haselden ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Metropolitan Police Department's ("MPD" or "Agency") adverse action of removing him from service. At the time of his removal, Employee's position of record was Lieutenant, Class 5 with the Agency. This matter was originally assigned to Administrative Judge Lois Hochhauser. On or about April 13, 2006, this matter was reassigned to the undersigned Administrative Judge. Thereafter, multiple status conferences were held in this matter. Ultimately, the undersigned determined that an evidentiary hearing ("EH") was necessary. Consequently, the parties convened for an evidentiary hearing on February 21 & 22, 2007.

The issue that was decided as a result of the EH was whether the Agency's action of removing Employee from service was done in accordance with applicable law, rule, or regulation. Agency in attempting to meet its burden of proof before the undersigned cited the Employee for several charges of misconduct including:

[1] Employee also timely filed a Motion for Attorney's Fees and Costs on or around May 20, 2008. The parties are currently participating in mediation and settlement negotiations relative to the issue of attorney's fees and costs. A separate Addendum Decision on Attorney's Fees shall be issued at a later date addressing this issue.

- Drinking 'alcoholic beverages', while in uniform off duty; or being under the influence of 'alcoholic beverage' when off duty."

- Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201, Number 26, Part I-B-22 which provides: "Members shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon themselves or the department."

Agency cited several specifications under the rubric of the aforementioned charges of misconduct in effectuating the Employee's removal. As was indicated previously, I convened an EH in the instant matter. On March 17, 2008, I issued an Initial Decision wherein I found that Agency failed to meet its burden of proof relative to all of the charges and specifications levied against the Employee. Accordingly, I ordered the following:

1. Agency's action of removing the Employee from service is **REVERSED**; and

2. The Agency shall reinstate the Employee to his last position of record; and

3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and

4. The Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

Initial Decision at 18.

Agency opted not to contest the Initial Decision either through the Board of the OEA or through the District of Columbia Superior Court. Accordingly, on or about April 21, 2008, the Initial Decision became the Final Decision ("FD") of the OEA. On or around May 12, 2008, Employee reported for duty with the Agency. Initially, Employee was placed in non-contact duty status. In its Supplemental Response to Employee's Motion to Enforce OEA Order ("Agency Supplemental Response") date stamped as received on November 7, 2008, Agency defined non-contact duty status as follows: "a member is returned to an active duty status for non-medical reasons wearing civilian clothes. The member's police powers are revoked and he/she is assigned to a position that does not require the exercise of police powers." MPD General Order 1202.4, Part I

B.2. While working in this non-contact status, the Employee was/is being paid the same rate of pay he would have received if the removal action had never occurred. Further, the parties agree that the Employee has received all back-pay and benefits otherwise due him.

On or around September 10, 2008, Employee filed with this Office, a Motion to Enforce OEA Order, which shall be addressed as a Motion for Compliance. At the crux of this compliance matter is that to date, Employee has not been taken off of non-contact duty status and, as the Employee contends, he has been reinstated to a "sham" position. Employee further argues that his latest maneuver by the MPD is an attempt to circumvent the OEA's statutory authority. Agency contends that this new removal action arises out of other facts and circumstances unrelated to the FD and considering as much, they have complied with the letter and spirit of the FD. Also, Agency has levied another charge against Employee that it contends is unrelated to the instant matter, this being the reason why Employee has not yet been taken off of non-contact duty status. The Employee, through counsel, counters that the facts and circumstances that are currently being contested at the Agency are directly related to the FD.

## JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUE

Whether this matter should be certified to the General Counsel for enforcement.

## ANALYSIS AND CONCLUSION

### Employee's Position

Employee agrees that the Agency has provided him with the back pay and benefits due him pursuant to the FD while working in the non-contact duty status. However, Employee asserts that the MPD's failure to return him to full duty status amounts to a sham reinstatement, wherein Agency is looking for a creative means to remove the Employee in spite of this Office's FD to the contrary. Employee correctly notes that the Agency, in pursuing the new inefficiency charge, relies in part on the same facts and circumstances that were the subject of the EH and the resulting FD. Further, the OAG generally relies on the adverse action panel findings in coming to the determination that it would not sponsor the Employee's testimony before any criminal or administrative tribunal.

The Employee proffers the Merit Systems Protection Board[2] ("MSPB") case of *John Kerr v. National Endowment for the Arts*[3] to support his sham reinstatement

[2] The Merit Systems Protection Board is the OEA's federal counterpart. They provide similar protections and review of matters involving Federal workers. The creation of the OEA was based in part on the

argument. In the *Kerr* decision, the Court ruled, in relevant part, that the MSPB's consideration of this matter did not end with the mere reinstatement of the employee's position and that its jurisdiction included considering whether the employee had been reinstated to a sham position. The Court went on to state that:

> ...appropriate steps to enforce compliance must include more than the formal determination that an individual was reinstated to a position bearing the same title, grade and pay-no matter what the actual content of that position may be at the time of reinstatement. Rather, the Board should, where appropriate, also make a substantive assessment of whether the actual duties and responsibilities to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge. Id. at 733.

Agency's Position

Agency contends that placing the Employee in a non-contact status is standard procedure in matters similar to this one. Agency further contends that this was done in an attempt to timely comply with the FD while still struggling with the mandate of making sure that all sworn members are competent to perform their assigned duties. While in non-contact duty status, Agency was able to administer required reinstatement training and testing of Employee, as well as conduct a background investigation into Employee's activities from his removal date to the date of his reinstatement. *See generally*, Agency's Supplemental Response at 1.

Agency contends that while conducting said background investigation, Employee was charged anew with a separate charge of Inefficiency which the Agency argues is unrelated to the FD. This charge is based on a review of the instant matter by Attorney General Peter Nickels ("Nickels") whereby it was determined by Nickels that several members of the Agency, including the Employee, engaged in conduct that went to their honesty and truthfulness. These members had previously been removed. However, for procedural reasons, these same members were reluctantly reinstated to their former positions of record. As a result, Nickels acting under the aegis of the Office of the Attorney General ("OAG") would not sponsor the Employee's testimony before any future administrative or criminal proceedings. In making this determination, the OAG relied primarily upon the ruling rendered by the adverse action panel[4] as opposed to the EH and the resulting FD issued by the undersigned. To date, an administrative hearing before the Agency's adverse action panel is currently scheduled for December 16, 2008, on the inefficiency charge. Because the inefficiency charge was commenced while the Employee's background investigation was still being completed, the Employee was not

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example provided by the Merit Systems Protection Board.

[3] 726 F.2d 730 (Fed. Cir. 1984).

[4] The adverse action panel mentioned here was part of the administrative process conducted by the Agency prior to it making a final decision to remove the Employee in the cause of action that gave rise to the FD.

returned to full duty status. Agency has proffered no other credible reason for its determination that the Employee failed his background investigation.

As will be explained below, I agree with the Employee's rendition of events and his argument that his reinstatement to a sham position is a matter properly enforced by the OEA under the instant circumstances.

OEA Rule § 636.1, 46 D.C. Reg. at 9321 (1999) reads as follows:

> Unless the Office's final decision is appealed to the District of Columbia Superior Court, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.

OEA Rule 636.8, *id.*, provides in pertinent part as follows:

> If the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel. The General Counsel shall order the agency to comply with the Office's final decision in accordance with D.C. Code § 1-606.02.

I find that the Agency has attempted to circumvent the authority of the OEA by denying the Employee the duties and responsibilities of his last position of record in an attempt at depriving the Employee of his career service rights. I further find that the Employee was reinstated to a sham position by the Agency. Agency did so under the guise of a separate charge that is based entirely on the facts and circumstances that were adjudicated by the undersigned and incorporated into the FD.

In finding against the MPD, I adopt the holding in *Kerr* requiring that "the consideration of this matter [does] not end with the mere reinstatement of the employee's position and that [the Board's] jurisdiction included considering whether the employee had been reinstated to a sham position." *Kerr* at 733.

In a compliance matter, the Administrative Judge's role is to determine whether or not the Agency has complied with the OEA's Final Decision. Furthermore, D.C. Official Code 1-606.02 (a) (6) empowers the Board of the OEA with the authority to "[o]rder any agency or employee of the government of the District of Columbia to comply with an order or decision issued by the Office under the authority of this chapter and to enforce compliance with the order or decision." Under the instant circumstances, to do otherwise would undermine the authority of this Office as well as the career service rights that employees of the District government enjoy under the auspices of D.C. Official Code § 1-606.03.

This Addendum Decision on Compliance should not have any bearing on the current status of the adverse action panel convened on the inefficiency charge because

Agency has not, to date, effectuated a separate adverse action which would predicate any OEA involvement. Regardless of the status of the separate inefficiency charge levied against the Employee, it should not have any bearing on the OEA proceeding expeditiously towards restoring Employee to the *status quo ante* envisioned by the FD.

Based on the foregoing, I find that the MPD has not complied with the Final Decision. Consequently, pursuant to OEA Rule 636.8, *supra,* this matter is hereby certified to the Office of Employee Appeals General Counsel for appropriate enforcement action.

ORDER

It is hereby ORDERED that this matter be certified to the General Counsel for enforcement of the Final Decision.

FOR THE OFFICE: ___/s/_____
ERIC T. ROBINSON, Esq.
Administrative Judge